

AKLAND

LAW FIRM, PLLC

317 E. Spruce Street • PO Box 7274 • Missoula MT 59807 • 406 544-9863
aklandlawfirm@gmail.com

May 18, 2017

VIA CERTIFIED MAIL

Administrator Scott Pruitt
U.S. Environmental Protection Agency
Mail code: 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Secretary Ryan Zinke
U.S. Department of Interior
1849 C. Street, N.W.
Washington D.C. 20240

Director
U.S. Fish and Wildlife Service
1849 C. Street, N.W. Rm 3331
Washington D.C. 20240

Montana Ecological Services Field Office
585 Shepard Way, Suite 1
Helena, MT 59601-6287

RE: 60-Day Notice of Intent to Sue under the Endangered Species Act

Dear Environmental Protection Agency Administrator:

You are hereby notified that Alliance for the Wild Rockies ("Alliance") intends to file a citizen suit pursuant to the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g) for violations of the ESA, 16 U.S.C. § 1531 et seq. Alliance will file the suit after the 60-day period has run unless the violations described in this notice are remedied. The name, address, and phone number of the organizations giving notice of intent to sue is as follows:

Michael Garrity, Executive Director
Alliance for the Wild Rockies
P.O. Box 505
Helena, Montana 59624
406-459-5936

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2017 MAY 23 AM 3:01
OFFICE OF THE
EXECUTIVE SECRETARY

The names, addresses, and phone numbers of counsel for the notifier is as follows:

Kristine M. Akland
Akland Law Firm, PLLC
PO Box 7274
Missoula, MT 59807

STATEMENT OF THE LAW

ESA § 7 requires that all federal agencies work toward recovery of listed species, and it contains both a procedural requirement and a substantive requirement for that purpose. Substantively, it requires that federal agencies insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the adverse modification of critical habitat for such species. 16 U.S.C. § 1536(a)(2). To carry out the duty to avoid jeopardy and adverse modification of critical habitat, ESA §7 sets forth a procedural requirement that directs an agency proposing an action ("action agency") to consult with an expert agency, in this case, the U.S. Fish & Wildlife Service, to evaluate the consequences of a proposed action on a listed species. 16 U.S.C. § 1536(a)(2).

As defined in the ESA's regulations, an "action" subject to consultation includes all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. 50 C.F.R. §402.02. The U.S. Court of Appeals for the Ninth Circuit holds that this regulatory language "admit[s] of no limitations" and that "there is little doubt that Congress intended to enact a broad definition of agency action in the ESA" *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994). Thus, ESA consultation is required for individual projects as well as for the promulgation of land management plans and standards. *Id.* "Only after the Forest Service complies with § 7(a)(2) can any activity that may affect the protected [species] go forward." *Pacific Rivers*, 30 F.3d at 1056-57.

During the ESA consultation process, if an agency determines that an action "may affect" a listed species it must develop a Biological Assessment ("BA"). If the agency concludes in a BA that the activity is not likely to adversely affect the listed species or adversely modify its critical habitat, and the FWS concurs with that conclusion in a Letter of Concurrence, then the consultation is complete. 50 C.F.R. §§402.12, 402.14(b). If, however, the agency determines that the activity is likely to adversely affect the listed species or its critical habitat, then the FWS completes a "biological opinion" to determine whether the activity will jeopardize the species or result in destruction or adverse modification of critical habitat. 50 C.F.R. §402.14. If the agencies determine that an action will jeopardize the species or adversely modify critical habitat, they may propose reasonable and prudent alternative actions that would avoid such results. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §402.14(g)(5).

Once the consultation is complete, the agencies have a duty to ensure that it remains valid. *See Center for Biological Diversity v. Salazar*, 695 F.3d 893 (9th Cir. 2012). To this end, an agency must re-initiate consultation if certain "triggers" occur. 50 C.F.R. § 402.16. The ESA's

implementing regulations require the agencies to re-initiate consultation where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16.

LEGAL VIOLATIONS

THE ENVIRONMENTAL PROTECTION AGENCY MUST INITIATE CONSULTATION FOR BULL TROUT AND MUST REINITIATE ESA CONSULTATION FOR DESIGNATED BULL TROUT CRITICAL HABITAT.

Bull trout are currently listed as a threatened species under the ESA. Bull trout are present in the Clark Fork River, Warm Springs Creek and Silver Bow Creek. The Environmental Protection Agency ("EPA") has neither initiated or completed ESA consultation on bull trout nor has EPA re-initiated/initiated consultation following bull trout critical habitat designation on October 18, 2010. 75 Fed. Reg. 63898 (Oct. 18, 2010). The 2010 rule designated a total of 19,729 miles of stream and 488,251.7 acres of reservoirs and lakes in the States of Washington, Oregon, Nevada, Idaho, and Montana as critical habitat for the bull trout including the Upper Clark Fork River, specifically from the confluence of the Blackfoot River upstream approximately 207.3 km to its confluence with Warm Spring Creek and the headwaters of Warm Springs Creek.

The EPA has authorized, funded and/or carried out remedial operations in the Anaconda Smelter Superfund Site in Anaconda-Deer Lodge County, Montana. The EPA has not re-initiated/initiated or completed consultation for bull trout or bull trout critical habitat on the following operating units: Old Works/East Anaconda Development Area OU, Community Soils OU, and Anaconda Regional Waste, Water and Soils OU. The EPA has never initiated or completed consultation to determine whether its operations in and near designated bull trout critical habitat will adversely affect designated bull trout critical habitat or jeopardize the existence of bull trout. Consultation on the effects of the Anaconda Smelter Superfund Site on bull trout is required as the actions within the OUs may have an effect on bull trout. Consultation on critical habitat was required when critical habitat was designated in 2010, but has not yet occurred.

Section 9 of the ESA states that it is unlawful for any person to "take any [endangered or threatened] species within the United States..." 16 U.S.C. §1538(a)(1)(B). As defined under the ESA, the term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. §1532(19). The ongoing and future activities of the EPA is in violation of 16 U.S.C. § 1538(a)(1)(B) because ongoing site specific operations without re-initiating/initiating consultation on the effects their site-specific operations has on bull trout and designated bull trout critical habitat constitute a "taking" of a listed species. 50 C.F.R. §17.11(h). Alliance alleges that the EPA's activities, operations, and management schemes that result in a "taking" of bull trout are in violation of Sections 7 and 9 of

the ESA and must be stopped. 16 U.S.C. §1536(a)(2) (consultation); 16 U.S.C. §1538(a)(1)(B) (take prohibition); 50 CFR 402.14(h)(2).

The EPA has ignored its duty under the ESA, 16 U.S.C. §§ 1531 *et seq.*, to ensure that its actions do not adversely affect bull trout and bull trout critical habitat and that its actions promote conservation and recovery of the species. The EPA's actions in this matter represent an unlawful departure from its legally binding mandate to protect and recover imperiled species and their habitats. If the violations of law described above are not cured within 60 days, the Alliance intends to file suit for declaratory and injunctive relief, as well as for attorney and expert witness fees and costs.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kristine M. Akland', written over the printed name.

Kristine M. Akland